84-802

No.

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# In the Supreme Court of the United States

**October Term, 1984**

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J. D. SPENCER, JR.,
*Petitioner,*

vs.

MISSOURI PACIFIC RAILROAD COMPANY,
*Respondent.*

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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## PETITION

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## QUESTIONS PRESENTED FOR REVIEW

1. Whether the Railway Labor Act, 45 U.S.C. Sec. 151, *et seq.*, preempted Arkansas tort law which gave a cause of action for actual and punitive damages where there was a malicious and wilful interference with petitioner's rights under his employment contract with respondent, and therefore, whether respondent's motion for summary judgment for lack of jurisdiction over the subject matter was properly granted.

   A. Whether an intentional tort is a "minor dispute" within the purview of the Railway Labor Act, 45 U.S.C. Sec. 151, *et seq.*

2. Whether petitioner's complaint pleads a cause of action under Arkansas tort law, as stated above.

3. Whether petitioner's deposition testimony presents a jury question.

4. Whether petitioner's motion for remand of cause to state court should have been sustained.

5. Whether petitioner was required to exhaust the contractual or administrative remedies before filing suit.

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# No.

# In the Supreme Court of the United States

**October Term, 1984**

J. D. SPENCER, JR.,
*Petitioner,*

vs.

MISSOURI PACIFIC RAILROAD COMPANY,
*Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

## PETITION

Petitioner prays that a Writ of Certiorari issue on behalf of petitioner J. D. Spencer, Jr., from the judgment of the Eighth Circuit Court of Appeals affirming dismissal of petitioner's action against respondent by the Honorable William L. Hungate, United States District Judge for the Eastern District of Missouri, for lack of subject matter jurisdiction.

## OPINIONS BELOW

The opinion of the U. S. District Court is reported at 581 F. Supp. 1220. The opinion of the Eighth Circuit Court of Appeals is reported at 743 F.2d 627. No motion for rehearing was filed.

## JURISDICTION

Jurisdiction in this Court is invoked under 28 U.S.C. Section 1254(1).

The date of the judgment and its entry was September 24, 1984.

No motion for rehearing was filed and no extension of time was requested for petitioning for a writ of certiorari.

The statutory provision, 28 U.S.C. Section 1254(1) confers jurisdiction to review the judgment in question by writ of certiorari:

> "Sec. 1254. Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;"
>
> * * *

## STATUTORY AND PROCEDURAL RULES PROVISIONS INVOLVED

28 U.S.C. Sec. 1254(1)

"Sec. 1254. Court of Appeals; Certiorari; appeal; certified questions.

"Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

> "(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;
>
> * * *

June 25, 1948, c. 646, 62 Stat. 928."

## 45 U.S.C. Sec. 151a

"Sec. 151a. General purposes.

The purposes of the chapter are: (1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization to carry out the purposes of this chapter; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions.

May 20, 1926, c. 347, § 2, 44 Stat. 577; June 21, 1934, c. 691, § 2, 48 Stat. 1186.

## 45 U.S.C. Sec. 153

§ 153. National Railroad Adjustment Board—Establishment; composition, powers and duties; divisions; hearings and awards; judicial review

First. There is established a Board, to be known as the "National Railroad Adjustment Board", the members of which shall be selected within thirty days after June 21, 1934, and it is provided—

* * *

(i) The disputes between an employee or group of employees and a carrier or carriers growing out of

grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on June 21, 1934, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

* * *

(o) In case of an award by any division of the Adjustment Board in favor of petitioner, the division of the Board shall make an order, directed to the carrier, to make the award effective and, if the award includes a requirement for the payment of money, to pay to the employee the sum to which he is entitled under the award on or before a day named. In the event any division determines that an award favorable to the petitioner should not be made in any dispute referred to it, the division shall make an order to the petitioner stating such determination.

* * *

May 20, 1926, c. 347, § 3, 44 Stat. 578; June 21, 1934, c. 691, § 3, 48 Stat. 1189; June 20, 1966, Pub.L. 89-456, §§ 1, 2, 80 Stat. 208, 209; Apr. 23, 1970, Pub.L. 91-234, §§ 1-6, 84 Stat. 199, 200.

## STATEMENT OF FACTS

This action brought under Arkansas tort law against respondent alleging a wilful unlawful conspiracy between Defendant-Respondent, the Brotherhood of Locomotive Engineers and United Transportation Union (unions not joined as defendants) to interfere with petitioner's rights under his employment contract as fireman-engineer for Respondent. The conspiracy was carried out with resulting actual and punitive damages to petitioner. Suit was originally filed in the Circuit Court of St. Louis City, Missouri. Respondent removed the case to the U.S. District Court, Eastern District of Missouri on the alleged grounds that petitioner's rights were governed by the Railway Labor Act, 45 U.S.C. Sec. 151, *et seq.* Removal was pursuant to 28 U.S.C. Sec. 1441. Petitioner's motion to remand to state court was denied, holding that petitioner's rights were rocted in the collective bargaining agreement between the alleged conspirators and therefore the Railway Labor Act, 45 U.S.C. Sec. 151, *et seq.* governed.

Thereafter, on March 8, 1984 the U.S. District Court dismissed petitioner's suit on the ground that it had no jurisdiction over the subject matter because the Railway Labor Act had preempted the Arkansas tort law.

The interference with plaintiff's contract rights alleged in petitioner's petition filed in state court was "in regard to union rules and contractual provisions governing same, to include seniority, job assignments, time claims and grievances, work rules, places and kinds of work, holding of valid union meetings (as required by union rules) and plaintiff's relationship with defendant, with said unions and other employees of defendant." The ac-

tion was in two counts, the first for actual damages and the second for punitive damages.

The only testimony taken was that of petitioner, by deposition, a part of the record here. He testified in support of his allegations in the petition:

1. That after respondent's official had ordered a complaint of petitioner remedied, the union conspirators' representatives told the official to leave the situation (as to work assignments) as it is, and the official rescinded his corrective order, and that there was a conspiracy, as alleged. Pages 56, 57, 83, 84.

2. The conspiracy was wilful and malicious. Page 81.

3. There was no action on his claims turned in, either by the local unions or the general chairman of the unions. Also, there was no action taken by respondent's officials. Pages 36-38, 75. It was useless to appeal further. Page 83.

4. After petitioner started filing grievances, his being considered as an official of the railroad ended, and he was told by one of its officials that he was going to be fired because the filing of the grievances was resented by respondent and the unions. Pages 69, 70.

Petitioner did not pursue his grievances as he had a right to do under the collective bargaining agreement and the Railway Labor Act, 45 U.S.C. Sec. 153, First (i), because it would be futile to do so, because of the conspiracy and elected to file this suit.

## REASONS FOR ALLOWANCE OF THE WRIT

1. The decision below conflicts with the holding in *Graf v. Elgin, Joliet & Eastern Ry. Co.*, C.A. Ill., 1983, 697 F.2d 771, that where the railroad and plaintiff's union colluded to prevent worker from having his grievance considered under procedures set up by collective bargaining agreement, the court has the power to award damages against both the union and employer for their violation of the Railway Labor Act, 45 U.S.C. Sec. 153, and to determine whether the grievances had merit, following federal common law to make that determination.

2. The decision below sanctioned such a departure by the District Court as to call for an exercise of this Court's power of supervision, in view of the holding in *Silkwood v. Kerr-McGee*, 464 U.S. ....., 104 S. Ct. 615, 78 L. Ed.2d 443, that the Atomic Energy Act did not preempt Oklahoma common and statutory law, so that actual and punitive damages could be awarded where defendant's acts made it "guilty of oppression, fraud, or malice, actual or presumed", and plaintiff was injured thereby.

3. The decision below decided the important question of federal law that the Railway Labor Act, 45 U.S.C. Sec. 151, *et seq.* preempted the tort law of the State of Arkansas, which question has not been, but should be settled by this Court, because it denies railroad workers any access to the courts (except to enforce an order of the Railroad Adjustment Board), therefore making the railroads judgment proof, no matter how malicious, intentional or wilful its acts, so neither actual nor punitive damages may be recovered for tortious wrongs.

4. The decision below, together with its holding in *Landfried v. Terminal R.R. Ass'n of St. Louis*, 8th Cir., 1983, 721 F.2d 254, which held that the discharge of an employee for bringing a suit for damages, following personal injuries, under the Federal Employers' Liability Act, 45 U.S.C. Sec. 151, *et seq.*, was not actionable, opens the door to emasculate the beneficent purposes of that act by injured employees' fear of being discharged if an injury claim is made.

5. The court in *Magnuson v. Burlington Northern*, 576 F.2d 1367 (9th Cir. 1978) disallowed an action for damages caused by emotional distress resulting from an intentional tort, which is in direct conflict with this court's holding in *Farmer v. United Brotherhood of Carpenters and Joiners of America*, 430 U.S. 290, 51 L. Ed.2d 338, 97 S. Ct. 1056 (1977).

6. The decision below, in effect, reverses the holdings of the Arkansas Supreme Court in the cases of *Hogue v. Sparks*, 225 S.W. 291; *Southwest Publishing Co. v. Ney*, 302 S.W.2d 538; *McCulla v. Brown*, 13 S.W.2d 314 and *Satterfield v. Rebsamen Ford*, 485 S.W.2d 192, which hold that petitioner's suit as brought, is actionable under tort law, even though plaintiff had also suffered damage from a breach of contract; the choice of which remedy to pursue being with plaintiff.

## CONCLUSION

There is much divergence of judicial opinion on the preemption doctrine in railroad employee cases. Most of the holdings rule that the only rights employees have against their employers are limited to the administrative remedies of the Railway Labor Act, 45 U.S.C. Sec. 151, *et seq.* Such holdings prevent any award of damages, no matter how wilful, intentional or vicious the employer's conduct. This court has not ruled on the effect of the Railway Labor Act on intentional tort cases, although it has done so as to the Atomic Energy Act (in *Silkwood v. Kerr-McGee,* 464 U.S. ....., 104 S. Ct. 615, 78 L. Ed.2d 443) and the National Labor Relations Act (in *Farmer v. United Brotherhood of Carpenters and Joiners of America,* 430 U.S. 290, 51 L. Ed.2d 338, 97 S. Ct. 1056).

It is submitted that certiorari should be granted so that this important field of law may be clarified.

Respectfully submitted,

Jo B. Gardner
*Attorney for Petitioner*

# APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 84-1438

J. D. Spencer, Jr.,
Appellant,

**v.**

Missouri Pacific Railroad Company,
Appellee.

Appeal from the United States District Court for the Eastern District of Missouri.

Submitted: September 11, 1984
Filed: September 24, 1984

Before ROSS, Circuit Judge, HENLEY, Senior Circuit Judge, and BOWMAN, Circuit Judge.

PER CURIAM.

This appeal was brought by J. D. Spencer, Jr., from the dismissal of his claim against Missouri Pacific Railroad Company. The district court[1] dismissed the action for lack of subject matter jurisdiction. We affirm.

Spencer, an employee of the defendant, originally filed this action in the Circuit Court of the City of St. Louis,

1. The Honorable William L. Hungate, United States District Judge for the Eastern District of Missouri.

Missouri, alleging that the defendant and two unions conspired to interfere with his employment rights with respect to certain union rules and related contractual provisions. The defendant removed the case to the federal district court pursuant to 28 U.S.C. § 1441. The district court denied a request by Spencer to have the case remanded to state court. The court held that the dispute was rooted in the collective bargaining agreement and was therefore governed by the Railway Labor Act, 45 U.S.C. § 151, *et seq.* Thereafter, the defendant filed a motion for summary judgment alleging that the plaintiff's claims were "minor disputes" under the Act, and that such disputes were to be resolved by the National Railroad Adjustment Board. *See* 45 U.S.C. § 153. The court agreed and granted the defendant's motion. Spencer now appeals the district court's decision.

We have carefully studied the record in this case and believe that the fact findings of the district court were not clearly erroneous, and that the court was correct in its application of the law. In accordance with the rules of this court, we affirm the judgment of the district court. *See* 8TH CIR. R. 14.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

(Filed October 19, 1984)

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT
September Term, 1983

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No. 84-1438EM

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J. D. Spencer, Jr.,
Appellant,

vs.

Missouri Pacific Railroad Co.,
Appellee.

---

Appeal from the United States District Court for the
Eastern District of Missouri
83-1366C(3)

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**JUDGMENT**

This appeal from the United States District Court was submitted on the record of the said District Court and briefs of the parties and was argued by counsel.

After consideration, it is ordered and adjudged that the judgment of the said District Court in this cause be, and the same is hereby, affirmed in accordance with the opinion of this Court. See 8th Cir. Rule 14.

September 24, 1984

A true copy.

ATTEST: /s/ Robert D. St. Vrain
Clerk, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT

(Filed March 8, 1984)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 83-1366C(3)

J. D. SPENCER, JR.,
Plaintiff,

v.

MISSOURI PACIFIC RAILROAD CO.,
Defendant.

**MEMORANDUM**

This matter is before the Court on defendant's motion for summary judgment. Having reviewed the record and plaintiff's deposition, plaintiff's complaint will be dismissed for lack of subject matter jurisdiction.

Plaintiff initiated this action in the Circuit Court of the City of St. Louis, charging defendant with intentional conspiracy to interfere with plaintiff's employment rights, and interference with those rights. Plaintiff characterized his action as a tort action based on Arkansas law, a characterization with which the Court does not agree. As noted by the Court in its August 23, 1983, order denying plaintiff's motion to remand, plaintiff's claims are rooted in a collective bargaining agreement and are subject to the Court's jurisdiction under the Railway Labor Act, 45 U.S.C. § 151, et seq. (hereafter Act).

Defendant seeks summary judgment based on its contention that plaintiff's claims are "minor" disputes under

the Act, and that state law has been preempted by the Act's exclusive remedies. A minor dispute is one arising out of a controversy regarding the meaning of an existing collective bargaining agreement in a particular fact situation. *Landfried v. Terminal Railroad Association of St. Louis,* 554 F.Supp. 720, 722 (E.D. Mo. 1982), *aff'd,* 721 F.2d 254 (8th Cir. 1983). The Act provides for resolution of such disputes by the National Railroad Adjustment Board (hereafter NRAB). Section 153. It is undisputed that plaintiff's disputes have not been presented to the NRAB.

"The Adjustment Board was created as a tribunal consisting of workers and management to secure the prompt, orderly and final settlement of grievances that arise daily between employees and carriers regarding rates of pay, rules and working conditions." *Union Pacific Railroad Company v. Sheehan,* 439 U.S. 89, 94 (1978) (citations omitted). The NRAB's jurisdiction is "presumably exclusive, [and] an aggrieved employee must ordinarily exhaust his remedies under the statutory grievance procedures before he may seek judicial review of his claim, and even then he is limited solely 'to the judicial review of the Board's proceedings that the Act itself provides.'" *Riddle v. Trans World Airlines, Inc.,* 512 F.Supp. 75 (W.D. Mo. 1981), *quoting Andrews v. Louisville & Nashville Railroad Co.,* 406 U.S. 320, 325 (1972).

Plaintiff attempts to circumvent the Act's requirements by insisting that Arkansas law, rather than the Act, applies to his claims. His argument is without merit. In *Andrews, supra,* the Court overruled its prior decision in *Moore v. Illinois Central Railroad Co.,* 312 U.S. 630 (1941), that the Act's procedures for adjustment of minor disputes were optional and that a state could therefore accord a discharged railroad employee an alternative remedy under

state contract law. Instead, the Court concluded in *Andrews,* the Act's administrative remedy is compulsory and the plaintiff's claim of wrongful discharge was subject to the Act's requirement of submission to the NRAB for adjustment: "The fact that petitioner characterizes his claim as one for 'wrongful discharge' does not save it from the Act's mandatory provisions for the processing of grievances." *Id.* at 323-24. Plaintiff's reliance on *Robinson v. Missouri Pacific Transportation Co.*, 85 F.Supp. 235 (W.D. Ark. 1949) is misplaced, in that *Robinson* was decided prior to the Supreme Court's decision overruling *Moore.*

Moreover, the case for application of the Act's requirement to submit minor disputes to the NRAB for resolution is even more compelling here than in the *Andrews* case, where the discharged employee had expressed his intention to work elsewhere. In that case, the employer was being remitted to a decisionmaking process wherein he would be represented by a union no longer accountable to him by virtue of his membership. *See Andrews, supra* at 334 (Douglas, J., dissenting).

In this case, plaintiff has continued his employment with defendant and is a continuing union member; thus, his union must answer to him if his claim is lost. The fact that plaintiff claims conspiracy in addition to actual interference with his employment rights does not render his claim sufficiently different from normal disputes concerning interpretation of a collective bargaining agreement as to create an exception to the mandatory requirement that minor disputes be settled by the NRAB. Clearly, the source of the rights which plaintiff complains were invaded is the collective bargaining agreement to which defendant was bound.

Accordingly, defendant's motion for summary judgment will be granted and plaintiff's complaint will be dismissed for lack of subject matter jurisdiction.

Dated this 8th day of March, 1984.

/s/ William L. Hungate
United States District Judge

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No. 84-802

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1984

J. D. SPENCER, JR.,
*Petitioner,*

vs.

MISSOURI PACIFIC RAILROAD COMPANY,
*Respondent.*

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

## BRIEF FOR RESPONDENT MISSOURI PACIFIC RAILROAD COMPANY IN OPPOSITION

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## QUESTIONS PRESENTED

(1) Whether the Court of Appeals correctly concluded that the Railway Labor Act procedures for arbitration of a minor dispute are not optional but mandatory and exclusive.

(2) Whether the Court of Appeals correctly concluded that Petitioner Spencer's claims are minor disputes under the Railway Labor Act.

(3) Whether the Court of Appeals correctly concluded that removal of Spencer's action from the state court to the Federal court was proper.

## LIST OF PARTIES

The parties to this action are listed in the caption of the case in this Court.

Respondent Missouri Pacific Railroad Company is a wholly-owned subsidiary of Union Pacific Corporation. The following companies are also subsidiaries of Union Pacific Corporation and are thus affiliates of Missouri Pacific Railroad Company:

Union Pacific Railroad Company

Champlin Petroleum Company

Rocky Mountain Energy Company

Upland Industries Corporation

The following are partially owned subsidiaries of Missouri Pacific Railroad Company:

The Alton & Southern Railway Company

Arkansas & Memphis Railway Bridge and Terminal Company

The Belt Railway of Chicago

Brownsville & Matamoros Bridge Company

Chicago & Western Indiana Railway Company

Galveston, Houston and Henderson Railway Company

Great Southwest Railroad, Inc.

Houston Belt & Terminal Railway Company

Jefferson Southwestern Railroad Company

Kansas City Terminal Railway Company

The Pueblo Union Depot and Railroad Company

Southern Illinois and Missouri Bridge Company

Terminal Railroad Association of St. Louis

Texas City Terminal Railway Company

Trailer Train Company

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No. 84-802

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OCTOBER TERM, 1984

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J. D. SPENCER, JR.,
*Petitioner,*

VS.

MISSOURI PACIFIC RAILROAD COMPANY,
*Respondent.*

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On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

## BRIEF FOR RESPONDENT MISSOURI PACIFIC RAILROAD COMPANY IN OPPOSITION

### OPINIONS BELOW

On September 24, 1984, the United States Court of Appeals for the Eighth Circuit affirmed the judgment of the United States District Court for the Eastern District of Missouri. *Spencer v. Missouri Pacific R.R. Co.*, 743 F.2d 627 (8th Cir. 1984) (*per curiam*) (Appendix A, D). On March 8, 1984, the District Court granted Missouri Pacific Railroad Company's Motion for Summary Judgment. *Spencer v. Missouri Pacific R.R. Co.*, 581 F.Supp. 1220 (E.D. Mo. 1984) (Appendix B). The District Court had previously denied Spencer's motion to remand (Appendix C).

## JURISDICTION

Jurisdictional requisites are adequately set forth in the petition.

## STATUTES INVOLVED

Section 3, First (i) of the Railway Labor Act, 45 U.S.C. §153, and Section 1441(b) of 28 U.S.C. are set forth in Appendix E.

## STATEMENT OF THE CASE

Respondent Missouri Pacific Railroad Company (MPRR) is a rail carrier subject to the provisions of the Railway Labor Act, 45 U.S.C. §151, *et seq.* Petitioner J. D. Spencer, Jr. (Spencer) is currently employed by MPRR as a fireman-engineer.

The United Transportation Union (UTU) and the Brotherhood of Locomotive Engineers (BLE) are duly authorized collective bargaining agents for certain employees of MPRR within the meaning of the Railway Labor Act. The UTU represents the craft or class of firemen and the BLE represents the craft or class of engineers. MPRR is a party to several collective bargaining agreements with both the UTU and the BLE. Each agreement governs rates of pay, rules and working conditions for employees working in the applicable crafts or classes. Additionally, each agreement governs the procedure for processing and handling grievances and time claims growing out of the interpretation and application of the agreements.

Both agreements require an employee or the employee's BLE or UTU representative to present grievances and time claims to MPRR in writing and to appeal a denied claim to MPRR's designated officer.

Spencer is an employee under both agreements and bound by the provisions of both agreements.

On May 2, 1983, Spencer filed suit against MPRR in the Circuit Court of the City of St. Louis, Missouri. He alleged that MPRR:

> . . . wrongfully and unlawfully conspired to interfere with, and did interfere with, [his] employment rights in regard to union rules and contractual provisions governing same, to include seniority, job assignment, time claims and grievances, work rules, places and kinds of work, holding of valid union meetings (as required by union rules) and [his] relationship with [MPRR] with [his] unions and other employees of [MPRR].

He did not join the UTU or the BLE as defendant[s].

On June 6, 1983, MPRR removed the case to the United States Federal District Court, Eastern District of Missouri. MPRR's petition for removal alleged that the District Court had original jurisdiction under the Railway Labor Act and that removal was pursuant to 28 U.S.C. §1441. The District Court denied Spencer's motion to remand by Order and Memorandum dated August 23, 1983, on the ground that Spencer's claims are rooted in the collective bargaining agreement and removable under the Railway Labor Act.

Spencer admits that his claims are disputes between himself and MPRR. However, he denies that his disputes with MPRR extend also to claims against the UTU and BLE. He admits that his disputes with MPRR arise out of his employment relationship with MPRR and that the rights he claims MPRR allegedly violated stem from the UTU and BLE collective bargaining agreements. Spencer specifically describes his disputes with MPRR by reference to pages, provisions and article numbers of the UTU and BLE collective bargaining agreements.

Spencer did not himself or through his UTU or BLE representative present or appeal any of his grievances or time claims to MPRR's highest designated officer. Nor has Spencer or his BLE or UTU representative on his behalf submitted any of the grievances or time claims to the National Railroad Adjustment Board under Section 3 of the Railway Labor Act.

The District Court granted MPRR's Motion for Summary Judgment and dismissed Spencer's complaint for lack of subject matter jurisdiction. The Court found that the source of the rights Spencer claims were violated is the collective bargaining agreement and, therefore, his claims are minor disputes subject to the mandatory and exclusive jurisdiction of the National Railroad Adjustment Board under Section 3 of the Railway Labor Act. On appeal, the Eighth Circuit affirmed the District Court's judgment.

## THERE ARE NO VALID REASONS FOR GRANTING A WRIT

Spencer petitions for a writ of certiorari in an effort to avoid the mandatory and exclusive jurisdiction of the National Railroad Adjustment Board under Section 3 of the Railway Labor Act, 45 U.S.C. §153, by characterizing his cause of action as a tort action based on Arkansas law.

### I.

### The Decision Below Reaffirms The Principle That The Railway Labor Act's Remedy For Resolving Minor Disputes Is Mandatory And Exclusive

One of the primary purposes of the Railway Labor Act, 45 U.S.C. §151, *et seq.*, is to avoid interruptions to commerce caused by strikes and other labor disputes. *Union Pacific R.R. Co. v. Price*, 360 U.S. 601, 609; 79 S.Ct. 1351, 1356 (1959). To accomplish this purpose, the Act established a procedure for resolving disputes between a railroad and its employees. Although the Act does not label this type of dispute, the industry and the courts commonly apply the term "minor dispute" to such disputes.[1] The statutory definition for such

[1] By contrast, "major disputes" under Section 6 of the Act arise from efforts to establish a new collective bargaining agreement or to change an existing agreement. 45 U.S.C. §156.

minor disputes appears in Section 3 of the Act, which covers disputes "between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions. . ." 45 U.S.C. §153, First (i).

In *Elgin, Joliet & Eastern Ry. v. Burley*, 325 U.S. 711, 723; 65 S.Ct. 1282, 1290 (1945), the Court described this class of dispute:

> The second class [minor disputes], however, contemplates the existence of a collective bargaining agreement already concluded or, at any rate, a situation in which no effort is made to bring about a formal change in terms or to create a new one. The dispute relates either to the meaning or proper application of a particular provision with reference to a specific situation or to an omitted case. In the latter event the claim is founded upon some incident of the employment relation, or asserted one, independent of those covered by the collective bargaining agreement . . . In either case the claim is to rights accrued, not merely to have new ones created for the future.

Thus, minor disputes are controversies over the meaning of an existing collective bargaining agreement and generally involve only one employee in a particular fact situation. *Brotherhood of R.R. Trainmen v. Chicago River & Indiana R.R. Co.*, 353 U.S. 30, 33; 77 S.Ct. 635, 637 (1957).

After attempts at negotiations with the highest designated officer of the railroad fail, either party may refer a minor dispute to the National Railroad Adjustment Board. 45 U.S.C. §153, First (i).

> Section 3 of the Railway Labor Act confers jurisdiction on the National Railroad Adjustment Board to hold hearings, make findings, and enter awards in all disputes between carriers and their employees 'growing out of

> grievances or out of the interpretation or application of agreements' . . .

*Slocum v. Delaware L. & W. R.R. Co.*, 339 U.S. 239, 240; 70 S.Ct. 577, 577-578 (1950).

The jurisdiction of the Board to adjust or arbitrate minor disputes is exclusive. *Slocum v. Delaware L. & W. R.R. Co.*, 339 U.S. 239, 244; 70 S.Ct. 577, 579-580 (1950), *Union Pacific R.R. Co. v. Sheehan*, 439 U.S. 89; 99 S.Ct. 399 (1978). Despite the permissive words "may refer," Section 3 makes arbitration mandatory. The "[p]rovision for arbitration of a . . . minor dispute, is not a matter of voluntary agreement under the Railway Labor Act; the Act *compels* the parties to arbitrate minor disputes before the National Railroad Adjustment Board established under the Act." *Andrews v. Louisville & Nashville R.R. Co.*, 406 U.S. 320, 322; 92 S.Ct. 1562, 1564 (1972). [emphasis added]

Based upon the Railway Labor Act's requirements, the District Court reviewed the record to determine whether there was any question of fact that Spencer's claims are minor disputes. The record includes Spencer's admission that all of his claims arise out of his employment relationship with MPRR and are governed by the collective bargaining agreements to which MPRR is bound. Consequently, the Court granted summary judgment for MPRR on the basis that Spencer's claims are minor disputes subject to the exclusive jurisdiction of the National Railroad Adjustment Board.

Throughout this proceeding, Spencer has completely ignored the unequivocal terms as well as the obvious purpose of Section 3 of the Railway Labor Act. He seeks to convince this Court to do likewise. However, this Court has "time and again" pointed out that "Congress intended minor disputes of railway workers to be decided finally by the Railroad Adjustment Board." *Gunther v. San Diego and Arizona Eastern Ry.*, 382 U.S. 257, 263-264; 86 S.Ct. 368, 372 (1965). Spencer readily admits that he has not presented his disputes to the National

Railroad Adjustment Board. However, he claims the right to present his minor disputes in the first instance to a state court jury. The District Court rejected his request. The exclusive jurisdiction of the Board over minor disputes was established by this Court in *Slocum v. Delaware, L. & W. R. Co.*, 339 U.S. 239; 70 S.Ct. 577 (1950).

The reaffirmation of the terms and purpose of Section 3 of the Railway Labor Act by the Eighth Circuit and the District Court in this case certainly raises no question worthy of review.

II.

**The Decision Below Is Squarely In Line With Applicable Decisions Of This Court And Other Federal Courts Of Appeals**

Spencer argues that the Eighth Circuit's decision in this case conflicts with a Seventh Circuit case, *Graf v. Elgin, Joliet & Eastern Ry. Co.*, 697 F.2d 771 (7th Cir. 1983). *Graf* has absolutely no relevance to this lawsuit; the two decisions address totally different causes of action. In *Graf*, a railroad employee sued his union for breach of duty of fair representation and his employer for breach of the collective bargaining agreement. In the present case, although Spencer alleged MPRR "conspired" with his unions, he did not join his unions as defendants nor did he allege a breach of duty of fair representation. In any event, Spencer's own testimony contradicts his allegation of "conspiracy." He testified that his lawsuit is *not* a dispute between himself on the one hand and MPRR and his unions on the other hand.

Spencer then contends this Court's decision in *Silkwood v. Kerr McGee Corp., et al.*, ____ U.S. ____; 104 S.Ct. 615 (1984) supports his position that the Railway Labor Act does not preempt the tort law of the State of Arkansas. He further claims that the decision below effectively reverses decisions by

the Arkansas Supreme Court which allegedly allow any plaintiff to choose to sue either for breach of contract or for a tort arising out of the alleged contract breach. Spencer's reliance upon *Silkwood* is misplaced. Unlike the plaintiff in *Silkwood,* Spencer has an exclusive congressionally mandated procedure and remedy for pursuing and resolving his claims against MPRR, a procedure which he apparently has chosen not to pursue.[2] Moreover, in *Andrews v. Louisville & Nashville R.R. Co.,* 406 U.S. 323-324; 92 S.Ct. 1564-1565 (1972), this Court held that a state could not accord a railroad employee an alternate remedy under state law when the underlying source of the claim is the collective bargaining agreement.

Finally, Spencer belatedly contends, for the first time in his petition for certiorari, that this case fits within the narrow exception to the federal preemption rule made by *Farmer v. United Brotherhood of Carpenters and Joiners of America,* 430 U.S. 290; 97 S.Ct. 1056 (1977). Spencer's contention is patently without merit. Unlike *Farmer,* the District Court expressly found that "the source of rights which Spencer complains were invaded is the collective bargaining agreement . . ." *Spencer v. Missouri Pacific R.R. Co.,* 581 F.Supp. 1221 (1984).

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[2] It is an undisputed fact that Spencer did not present his disputes to the National Railroad Adjustment Board.

## CONCLUSION

The Petition for a Writ of Certiorari raises no issues of national importance and should be denied.

Respectfully submitted,

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# APPENDIX

## APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

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No. 84-1438

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J. D. Spencer, Jr.,
Appellant,

v.

Missouri Pacific Railroad Company,
Appellee.

Appeal from the United States
District Court for the Eastern
District of Missouri

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Submitted: September 11, 1984

Filed: September 24, 1984

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Before ROSS, Circuit Judge, HENLEY, Senior Circuit Judge, and BOWMAN, Circuit Judge.

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PER CURIAM.

This appeal was brought by J. D. Spencer, Jr., from the dismissal of his claim against Missouri Pacific Railroad Company. The district court[1] dismissed the action for lack of subject matter jurisdiction. We affirm.

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[1] The Honorable William L. Hungate, United States District Judge for the Eastern District of Missouri.

Spencer, an employee of the defendant, originally filed this action in the Circuit Court of the City of St. Louis, Missouri, alleging that the defendant and two unions conspired to interfere with his employment rights with respect to certain union rules and related contractual provisions. The defendant removed the case to the federal district court pursuant to 28 U.S.C. §1441. The district court denied a request by Spencer to have the case remanded to state court. The court held that the dispute was rooted in the collective bargaining agreement and was therefore governed by the Railway Labor Act, 45 U.S.C. §151, *et. seq.* Thereafter, the defendant filed a motion for summary judgment alleging that the plaintiff's claims were "minor disputes" under the Act, and that such disputes were to be resolved by the National Railroad Adjustment Board. *See* 45 U.S.C. §153. The court agreed and granted the defendant's motion. Spencer now appeals the district court's decision.

We have carefully studied the record in this case and believe that the fact findings of the district court were not clearly erroneous, and that the court was correct in its application of the law. In accordance with the rules of this court, we affirm the judgment of the district court. *See* 8TH CIR. R. 14.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT

## APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 83-1366C(3)

J. D. Spencer, Jr.,
Plaintiff,

v.

Missouri Pacific Railroad Co.,
Defendant.

## ORDER

(Filed March 8, 1984)

A memorandum dated this day is hereby incorporated into and made a part of this order.

IT IS HEREBY ORDERED that defendant's motion for summary judgment be and the same is granted, and plaintiff's complaint is dismissed for lack of subject matter jurisdiction.

Dated this 8th day of March, 1984.

William L. Hungate
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 83-1366C(3)

J. D. Spencer, Jr.,
Plaintiff,

v.

Missouri Pacific Railroad Co.,
Defendant.

**MEMORANDUM**

(Filed March 8, 1984)

This matter is before the Court on defendant's motion for summary judgment. Having reviewed the record and plaintiff's deposition, plaintiff's complaint will be dismissed for lack of subject matter jurisdiction.

Plaintiff initiated this action in the Circuit Court of the City of St. Louis, charging defendant with intentional conspiracy to interfere with plaintiff's employment rights, and interference with those rights. Plaintiff characterized his action as a tort action based on Arkansas law, a characterization with which the Court does not agree. As noted by the Court in its August 23, 1983, order denying plaintiff's motion to remand, plaintiff's claims are rooted in a collective bargaining agreement and are subject to the Court's jurisdiction under the Railway Labor Act, 45 U.S.C. § 151, et seq. (hereafter Act).

Defendant seeks summary judgment based on its contention that plaintiff's claims are "minor" disputes under the Act, and that state law has been preempted by the Act's exclusive remedies. A minor dispute is one arising out of a controversy regarding the meaning of an existing collective bargaining agreement in a particular fact situation. *Landfried v. Terminal Railroad Association of St. Louis,* 554 F.Supp. 720, 722 (E.D. Mo. 1982), *aff'd,* 721 F.2d 254 (8th Cir. 1983). The Act provides for resolution of such disputes by the National Railroad Adjustment Board (hereafter NRAB). Section 153. It is undisputed that plaintiff's disputes have not been presented to the NRAB.

"The Adjustment Board was created as a tribunal consisting of workers and management to secure the prompt, orderly and final settlement of grievances that arise daily between employees and carriers regarding rates of pay, rules and working conditions." *Union Pacific Railroad Company v. Sheehan,* 439 U.S.

89, 94 (1978)(citations omitted). The NRAB's jurisdiction is "presumably exclusive, [and] an aggrieved employee must ordinarily exhaust his remedies under the statutory grievance procedures before he may seek judicial review of his claim, and even then he is limited solely 'to the judicial review of the Board's proceedings that the Act itself provides.' " *Riddle v. Trans World Airlines, Inc.*, 512 F.Supp. 75 (W.D. Mo. 1981), *quoting Andrews v. Louisville & Nashville Railroad Co.*, 406 U.S. 320, 325 (1972).

Plaintiff attempts to circumvent the Act's requirements by insisting that Arkansas law, rather than the Act, applies to his claims. His argument is without merit. In *Andrews, supra*, the Court overruled its prior decision in *Moore v. Illinois Central Railroad Co.*, 312 U.S. 630 (1941), that the Act's procedures for adjustment of minor disputes were optional and that a state could therefore accord a discharged railroad employee an alternative remedy under state contract law. Instead, the Court concluded in *Andrews*, the Act's administrative remedy is compulsory and the plaintiff's claim of wrongful discharge was subject to the Act's requirement of submission to the NRAB for adjustment: "The fact that petitioner characterizes his claim as one for 'wrongful discharge' does not save it from the Act's mandatory provisions for the processing of grievances." *Id.* at 323-24. Plaintiff's reliance on *Robinson v. Missouri Pacific Transportation Co.*, 85 F.Supp. 235 (W.D. Ark. 1949) is misplaced, in that *Robinson* was decided prior to the Supreme Court's decision overruling *Moore*.

Moreover, the case for application of the Act's requirement to submit minor disputes to the NRAB for resolution is even more compelling here than in the *Andrews* case, where the discharged employee had expressed his intention to work elsewhere. In that case, the employer was being remitted to a decisionmaking process wherein he would be represented by a union no longer accountable to him by virtue of his membership. *See Andrews, supra* at 334 (Douglas, J., dissenting).

In this case, plaintiff has continued his employment with defendant and is a continuing union member; thus, his union must answer to him if his claim is lost. The fact that plaintiff claims conspiracy in addition to actual interference with his employment rights does not render his claim sufficiently different from normal disputes concerning interpretation of a collective bargaining agreement as to create an exception to the mandatory requirement that minor disputes be settled by the NRAB. Clearly, the source of the rights which plaintiff complains were invaded is the collective bargaining agreement to which defendant was bound.

Accordingly, defendant's motion for summary judgment will be granted and plaintiff's complaint will be dismissed for lack of subject matter jurisdiction.

Dated this 8th day of March, 1984.

William L. Hungate
United States District Judge

## APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 83-1366C(3)

J. D. Spencer, Jr.,
Plaintiff,

v.

Missouri Pacific Railroad
Company,
Defendant.

## ORDER

(Filed August 23, 1983)

A memorandum dated this day is hereby incorporated into and made a part of this order.

IT IS HEREBY ORDERED that plaintiff's motion to remand all or part of his action to state court be and the same is denied.

IT IS HEREBY FURTHER ORDERED that plaintiff's request for trial by jury be and the same is granted.

Dated this 23rd day of August, 1983.

William L. Hungate
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 83-1366C(3)

J. D. Spencer, Jr.,
Plaintiff,

v.

Missouri Pacific Railroad
Company,
Defendant.

**MEMORANDUM**

(Filed August 23, 1983)

This matter is before the Court on various pretrial motions.

Plaintiff, previously employed by defendant as a locomotive fireman-engineer, filed his action in the Circuit Court of the City of St. Louis, Missouri, against defendant, Missouri Pacific Railroad Company. Defendant removed plaintiff's action to this Court pursuant to 28 U.S.C. §1441. Plaintiff now moves this Court to remand to state court either the full action or any severable state claim, and, if remand is denied, plaintiff requests a trial by jury.

*Removal.* An action of which the United States District Court has original jurisdiction founded on a claim or right arising under the laws of the United States is removable to federal district court. 28 U.S.C. § 1441(b). The federal district court has original jurisdiction of claims arising under the Railway Labor Act, 45 U.S.C. § 151, et seq., which encompasses resolution of employment disputes regarding railroads. 28 U.S.C. § 1337(a); *Beasley v. Union Pac. R. Co.*, 497 F.Supp. 213, 214-15 (D. Neb. 1980), *appeal dismissed*, 652 F.2d 749 (8th Cir. 1981).

Plaintiff alleges in his complaint that defendant and two unions "wrongfully and unlawfully conspired to [interfere] with [his] employment rights in regard to union rules and contractual provisions governing same, to include seniority, job assignments, time claims and grievances, work rules, places and kinds of work, holding of valid union meetings and plaintiff's relationship with [defendants]." (Plaintiff's complaint, ¶ 4.)

Based upon this allegation, plaintiff maintains that this Court has no jurisdiction because his action is for an intentional tort under the laws of the State of Arkansas, rather than an employment dispute falling within the terms of the Railway Labor Act. Plaintiff further maintains that, even if this Court has jurisdiction under the collective bargaining agreement between plaintiff and defendant, then his action for conspiracy against defendant should be removed to the state court pursuant to 28 U.S.C. § 1441(c). Even assuming, arguendo, that plaintiff's conspiracy claim is separable from the employment dispute, the Court will not remand it to state court. When state and federal claims arise out of the same transaction and the same nucleus of operative facts, the federal court may have jurisdiction under the doctrine of pendent jurisdiction. *United Mine Workers of America v. Gibbs,* 383 U.S. 715, 725 (1966); *Poe v. John Deere Co.,* 695 F.2d 1103, 1106 (8th Cir. 1982). If there is no statutory bar to the exercise of jurisdiction, the federal court has discretion to entertain the pendent claims, provided the federal claim has sufficient substance to confer subject matter jurisdiction. *United Mine Workers of America v. Gibbs, supra* at 725. In determining whether to remand state claims, the federal court must consider judicial economy and fairness to the litigants. *Id.* at 726.

In the instant action, plaintiff's claims arise out of the same transaction and have a common nucleus of operative facts. The substance of plaintiff's claims are rooted in the collective bargaining agreement between plaintiff and defendant and are removable under the Railway Labor Act. *Beasley v. Union Pac. R. Co., supra,* 497 F.Supp. at 215; *Magnuson v. Burlington Northern, Inc.,* 576 F.2d 1367, 1369-70 (9th Cir.), *cert. denied,* 439 U.S. 930 (1978); *see also Schroeder v. Trans World Airlines, Inc.,* 702 F.2d 189, 191 (9th Cir. 1983); *Klemens v. Air Line Pilots Ass'n,* 484 F.Supp. 186, 188 (W.D. Wash. 1980). For the foregoing reasons and because of the strong federal interest at stake in deciding claims arising under the Railway Labor Act, the Court finds that, in the interests of judicial economy and fairness to the litigants, the cause was properly removed to federal court.

Therefore, plaintiff's motion to remand all or part of his action to state court will be denied.

*Demand for trial by jury.* Because the right to trial by jury is held inviolate and does not require an express demand in the State of Missouri, Mo. Rule 69.01 and Mo. Rev. Stat. § 510.190, plaintiff is not required to make a jury demand after removal from a Missouri court, absent order of this Court. Fed. R. Civ. P. 81(c). Here, no court order required such a demand. Hearing no objection, and finding no basis for denying the demand, plaintiff's demand for trial by jury will be granted.

Dated this 23rd day of August, 1983.

William L. Hungate
United States District Judge

## APPENDIX D

(Filed October 19, 1984)

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

September Term, 1983

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No. 84-1438EM

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J. D. Spencer, Jr.,
Appellant,

v.

Missouri Pacific Railroad Co.,
Appellee.

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Appeal from the United States District Court for the
Eastern District of Missouri
83-1366C(3)

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### JUDGMENT

This appeal from the United States District Court was submitted on the record of the said District Court and briefs of the parties and was argued by counsel.

After consideration, it is ordered and adjudged that the judgment of the said District Court in this cause be, and the same is hereby, affirmed in accordance with the opinion of this Court. See 8th Cir. Rule 14.

September 24, 1984

A true copy.

ATTEST: /s/ Robert D. St. Vrain
Clerk, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT

## APPENDIX E

**45 U.S.C. §153(i).** The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on June 21, 1934, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

**28 U.S.C. §1441(b).** Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.